NEGOTIABLE INSTRUMENTS — ACCOMODATION PAPER — CO-SURETIES—An interesting case, dealing with the Negotiable Instruments Law and the doctrines of suretyship was recently decided by the Supreme Court of Oregon. In this case,[1] the plaintiff and the defendant signed a promissory note for the accomodation of the maker. On the face of the note the plaintiff appeared to be a co-maker and the defendant's name appeared on the back as an anomalous indorser. The note was payable to a fourth person, who gave the accomodated party an extension of time The plaintiff having finally been forced to pay brings this suit against the defendant for contribution. The court allowed him to recover, saying that parol evidence was admissible to show that the defendant signed as co-surety with the plaintiff and, as the Negotiable Instruments Law does not apply to co-sureties, the law merchant governs.

Before the act, the anomalous indorser was held in different states to be *prima facie* an indorser, a second indorser, a maker, a guarantor or a surety.[2] These were only presumptions, however, and in most jurisdictions parol evidence was admissible to show the real intention of the parties.[3] Under section 63[4] of the Negotiable Instruments Law, the status of an anomalous indorser is that of an indorser unless parol evidence is admissible to change his character. From the majority of cases decided since the act was adopted, it would seem that parol evidence is not admissible[5] for this purpose. As an indorser, section 66[6] apparently makes him liable only to persons who sign subsequently to him. Without considering the liability of an ordinary indorser, however, section 64, sub-section 1[7] has expressly provided to whom the anomalous indorser is to be liable where the instrument is payable to a third party. The anomalous indorser is not liable, under any of these sections, to the maker.

In a New York case,[8] the court, feeling that this section would work an injustice, admitted parol evidence to show the true intention of the parties. The court in the principal case

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[1] Hunter v. Harris, 127 Pac. Rep. 786 (Ore., 1912).

[2] Carrington v. Odorn, 124 Ala. 529 (1899); DePonce v. Bank, 126 Ind. 553 (1890); Lewis v. Monahan, 173 Mass. 122 (1899); Sturtevant v. Randall, 53 Me. 149 (1865); Milligan v. Holbrook, 168 Ill. 343 (1897); Owings v. Baker, 54 Ind. 82 (1880); Temple v. Baker, 125 Pa. 634 (1889).

[3] Carrington v. Odorn, *supra;* DePonce v. Bank, *supra;* Sturtevant v. Randall, *supra.*

[4] Brannon, N. I. L.: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

[5] Hopkins v. Merril, 79 Conn. 626 (1907); Baumeister v. Kuntz, 53 Fla. 340 (1907); Rockfield v. Bank, 77 Ohio St. 311 (1907).

[6] Brannon, N. I. L., page 82.

cited this decision with great approval[9] and under its authority admitted parol evidence to show that the defendant signed as co-surety with the plaintiff. Even though the plaintiff is a co-surety, he is, under section 192[10] of the act, a party secondarily liable. Section 120, sub-section 6[11] of the act says that a party secondarily liable is discharged by an extension of time given by the holder to the party primarily liable. It would seem, therefore, that under these sections the defendant would be relieved.[12] The court, however, did not discuss these sections, but said that as the act did not cover the liability of co-sureties the law merchant applied.[13]

The necessity for the discussion in the principal case was probably brought about by the interpretation of the act as to the liability of an accomodation maker where an extension of time has been given by the creditor to the real debtor. Before the act an extension of time to an accomodated party with knowledge that he was the real debtor relieved the accomodation maker in practically every jurisdiction.[14] Some jurisdictions even since the passage of the act still uphold this proposition.[15] The majority of jurisdictions, including that of the principal case, however, hold that the act having made the accomodation maker primarily liable, he is not relieved by an extension of time.[16] Under the cases which hold that the law has not been changed by the act, the payment by the plaintiff would have been voluntary and the defendant would have been discharged both under the act and at the law merchant.[17] In jurisdictions which hold that the law has been changed by the act, however, the payment by the plaintiff

[7] Brannon, N. I. L., page 76 (2 ed.): "Where a person not otherwise a party to an instrument places thereon his signature in blank before delivery he is liable in accordance with the following rules—(1) If the instrument is payable to a third person he is liable to the payee and to all subsequent parties."

[8] Haddock v. Haddock, 192 N. Y. 499 (1908).

[9] Brannon thinks the case was incorrectly decided. Brannon, N. I. L., page 78, 2nd Ed.

[10] Brannon, N. I. L., 2nd Ed., page 158: "Person primarily liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All others are secondarily liable."

[11] "A person secondarily liable on the instrument is discharged: (6) By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved." Brannon, N. I. L., page 120.

[12] Deahy v. Choquet, 28 R. I. 338 (1907).

[13] Brannon, N. I. L., page 160.

[14] Canadian Bank v. Coumbe, 47 Mich. 358 (1882); Olmstead v. Latimer, 178 N. Y. 465 (1904); Drechler v. Fulham, 11 Col. App. 62 (1898); Turrill v. Boynton, 23 Vt. 142 (1851).

[15] Farmers' Bank, Wickliffe v. Wickliffe, 134 Ky. 627 (1909); Lumber Co. v. Snouffer, 139 Iowa 176 (1908). In this case the doctrine was limited to original parties to the instrument.

[16] Bradley etc. Co. v. Heyburn, 56 Wash. 628 (1910); Wolstenholme v. Smith, 34 Utah 300 (1908); Richards v. Bank Co., 81 Ohio 348 (1910); Vanderford v. Farmers' Bank, 105 Md. 164 (1907); Cellers v. Meschen, 49 Ore. 186 (1907).

[17] Childs on Suretyship, page 342 and cases cited.

would not have been voluntary. Had the court in the principal case held that the act governed and the defendant was relieved of liability, they would be deciding that a surety whose payment was non-voluntary could not recover from his co-surety for contribution. This would have been directly opposed to the contract between the parties and the laws of suretyship.

E. L. H.

SALES—PASSING OF TITLE—RISK OF LOSS—The ascertainment of the time when title passes in a sale of chattels becomes important when the chattels are destroyed before payment, since the usual rule is that the loss follows the title.[1]

In *Wesco Company* v. *Town of Allerton*,[2] the defendant bought of the plaintiff an electric lighting outfit. The contract provided that: "The acceptance of this machine . . . is solely on condition, after having been tested the machine is found to fully meet all conditions . . . . or it shall be removed by the town." The plaintiff was to furnish the apparatus for testing. Half the price was to be withheld until a satisfactory test was had. Upon testing, a leak was discovered, and a further test was agreed upon, pending which the defendant used the outfit. The machine was destroyed by fire, without negligence of the defendant, before the second test, and this was a suit for the cost. The Supreme Court of Iowa decided that, under these circumstances, the lower court was justified in finding, as a matter of fact, that title was not to pass until after the final test, and that therefore the plaintiff could not recover.

Except so far as the right of third persons may be concerned, the passage of title is subject entirely to the intention of the parties.[3] It may happen at any stage of the proceeding, provided there is a subject of sale in existence,[4] and in the absence of a clear agreement, the courts have laid down certain rules of convenience and presumed intention.

In the ordinary case of the sale of a specific chattel, where nothing remains to be done except to deliver or to make payment, title is held to pass,[5] subject to the vendor's lien for the price,[6] and this is frequently so even where the sale is said to be "for cash."[7] Neither delivery nor payment is essential to the transfer of title.[8]

Where something remains to be done as between the parties

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[1] Joyce v. Adams, 8 N. Y. 291 (1853).

[2] 137 N. W. Rep. 1046 (Ia., 1912).

[3] Byles v. Collier, 54 Mich. 1 (1884); Riddle v. Varnum, 20 Pick. 280 (Mass., 1838).

[4] Dixon v. Yates, 5 B. & Ad. 313 (1834); Tarling v. Baxter, 6 B. & C. 360 (1827).

[5] Hinde v. Whitehouse, 7 East. 558 (1806).

[6] Wade v. Moffett, 21 Ills. 110 (1859).

[7] Clark v. Greeley, 62 N. H. 394 (1882); but see Paul v. Carver, 52 N. H. 136 (1872).

[8] Hayden v. Demets, 53 N. Y. 426 (1873).